IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 616 OF 2005

Smt. Gita Prakash Shah (Fifadra) ...Appellant
Vs.
Balvantrai Amarchand Shah (Fifadra) & Ors. ...Respondents

Mr.R.B. Jaiswal Advocate for Appellant
Ms. Sangeeta Musale i/b. Mr. V.J. Hegde Advocate for Respondent No.1

CORAM: SMT.ROSHAN DALVI,J.
DATED: 28TH JUNE, 2007

P.C.

1. Heard Appellant's Advocate. Appellant present. Perused the entire record of the Bombay City Civil Court. The Suit has been disposed off upon the examination and cross examination of the Plaintiff, the father-in-law of the Appellant. The Defendants in the Suit being Appellant and her husband failed to file written statement. A decree of mandatory injunction has been passed.

2. However, pending the suit two Notices of Motion had been taken out in these interim orders for protection of the Plaintiff as the owner of the premises as well as the Defendant No.2(the Appellant) as the wife living in the

matrimonial home who was the daughter-in-law of the Plaintiff were protected. That order has not been complied until the hearing of the Suit.

3. The Appellant had filed an application for Injunction and maintenance in the Family Court against the Respondent No.2, her husband. In her interim application she had obtained an injunction against her removal from the suit premises. Despite that order of injunction, the Suit has been heard after considering only the Plaintiff's case and without the written statement of the Defendants. Ofcourse, that is because the Appellant failed to file her written statement despite time granted and directions passed. She claims that she did not expect the suit to proceed before the interim order was executed and she also had to attend the family Court, where her petition was filed.

4. The Defendant No.1 is stated not to be residing in the house, by the Advocate for Respondent No.1 appearing for him in this Appeal. The Appellant states that her husband continues to reside in her father-in-law's house and that Respondent No.1 (the plaintiff in the Suit) has ousted and evicted only her from the suit premises. There may be collusion between the Plaintiff and Defendant No.1 which will have to be considered on merits. Defendant No.1

(Appellant No.2 herein) has not challenged the judgment and order. However the Appellant who was Defendant No.2 in the suit desires to be heard on merits.

5. It is seen that the Appellant could have been under a wrong impression as claimed by her. The merits of her case would have to be considered in the light of the interim order which prevailed until the suit which was passed in the interest of both the parties and in the light of her specific right to residence and maintenance under Section 17 r.w. Section 26 of the Domestic Violence Act.

6. The Advocate for the Respondent No.1 states that Respondent No.2 (defendant no.1 in the Suit) is not residing in the suit premises. The Appellant who is present in the Court states that he continues to reside therein.

7. The suit is required to be heard on merits. Hence, the impugned judgment and order dated 21st June, 2007 of the Judge, Bombay City Civil Court is set aside. The suit is restored to file, to be heard and disposed of on merits. Interim orders passed earlier being orders dated 7th February, 2002 as well as 21st March, 2002 are accordingly restored and shall continue to be in force until the Suit is disposed off.

8. The Appellant (defendant no.2 in the suit) shall file her written statement within 2 weeks. Together with the written statement, she shall also file her affidavit of examination-in-chief within 2 weeks. She shall also keep ready the draft issues that arise from the pleadings for the convenience of the Court.

9. The learned Judge shall frame issues based upon the written statement and commence recording of evidence at his convenience or refer the suit to a Commissioner for recording evidence of the Appellant (Defendant No.2 in the Suit). The evidence already recorded shall be considered in the Suit. The Appellant's Advocate concedes that the Appellant does not require to further cross examine Respondent No.1 (the Plaintiff in the suit).

10. Respondent No.1 shall, however be allowed to lead any further evidence in the Suit if he so desires, which would be subject to further cross-examination.

11. Respondent No.2 is stated to have been residing out of the suit premises.

12. In fact the Advocate for Respondent No.1 states to Court

that Respondent No.1 does not know the whereabouts of Respondent No.2. Hence, Respondent No.2 is seen to have submitted to the decree. Consequently, the Suit needs to proceed only against the Appellant.

13. The suit shall proceed and be disposed off in due course.

14. Record and Proceeding of the trial Court shall be returned to the trial Court.

(SMT. ROSHAN DALVI, J.)